In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-910

E. L. BAKER, JR. AND HENRY SIMON, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. In February 1970, the Small Business Administration loaned $200,000 to Whitehouse Plastics Corporation. The loan was secured by a mortgage on the company's machinery, equipment, and furniture, and was guaranteed by petitioners, who are officers of Whitehouse. Whitehouse executed a promissory note payable to the order of Northwest National Bank, Fort Worth, Texas, the participating bank in the loan. The guaranties granted Northwest National Bank the power upon default to sell the collateral, without notice to the guarantors, at public or private sales.

Whitehouse defaulted on the payment of the note, and Northwest National Bank notified all debtors, including petitioners, of the default on or about October 1, 1970. Petitioners were also notified that payment was being accelerated in accordance with the terms of the note.

Northwest National Bank thereafter transferred and assigned the Whitehouse promissory note to the Small Business Administration. The SBA, through an auctioneer, advertised a public sale of Whitehouse's personal property. No notice of this sale was personally sent to either petitioner. The auctioneer conducted a public foreclosure sale of Whitehouse's personal property, which was attended by about 140 registered bidders, including petitioner Baker. Baker made one bid but no purchases. The net proceeds of the sale were applied by the SBA to the outstanding balance due on the loan to Whitehouse.

The United States then brought this action against petitioners and others to obtain a deficiency judgment. A jury trial was held. After the United States rested, petitioners objected that the United States had presented no evidence showing a commercially reasonable disposition of the collateral. The district court allowed the government to reopen its case to introduce the auctioneer's report, made in the regular course of business, which detailed the manner of advertising the foreclosure sale and the sums received for the auctioned personal property.

The jury returned a verdict for the United States, and the district court entered judgment in the amount of $212,275.86 (Pet. App. A A-2). Petitioner Baker's joint and several liability was limited to $199,050.39, and petitioner Simon's to $49,762.59 (*ibid.*).

The court of appeals affirmed (Pet. App. B; 501 F. 2d 692). Applying Texas law in accordance with the terms of the guaranty agreement (Pet. App. B A-5), the court assumed for purposes of the appeal that petitioners were entitled to notice of the foreclosure sale, notwithstanding the provision in the agreement purporting to waive notice, and that the evidence was insufficient to show that adequate notice was given to them (Pet. App. B A-6). The court concluded, however, that the Texas courts, if pre-

sented with the issue, would adopt the "better rule" (Pet. App. B A-7) and would hold that the failure to give notice does not preclude the SBA from recovering a deficiency judgment.

That is not to say that persons in petitioners' position would be without a remedy for the failure to give notice. If they can demonstrate that they were prejudiced by the lack of notice, that would give rise to a rebuttable presumption that the fair market value of the goods sold equals the total debt. In order to collect a deficiency judgment in those circumstances, the secured party would have the burden of showing that the fair market value equals the actual sale price (Pet. App. B A-10). The court held that the United States met that burden in the present case (*id.* at A-10 to A-12). It also held that the auctioneer's report was properly admitted into evidence under the federal business records statute (28 U.S.C. 1732(a)) (Pet. App. B A-12).

2. Petitioners contend (Pet. 10-13) that the Texas courts would bar a deficiency judgment if the foreclosure sale were conducted without adequate notice. They also argue (Pet. 14-16) that the auctioneer's report should not have been admitted into evidence. Both contentions were thoroughly considered and properly rejected by the court of appeals and do not merit further review by this Court.

Petitioners also claim (Pet. 8-10) that the failure to give them "notice and an opportunity to be heard prior to disposing of the property by foreclosure sale" (Pet. 10) constitutes a deprivation of property without due process of law in violation of the Fifth Amendment. That issue was neither presented to nor decided by the court of appeals and need not be considered by this Court. *Lawn* v. *United States,* 355 U.S. 339, 362, n. 16.

In any event, this Court's decision in *Fuentes* v. *Shevin*, 407 U.S. 67, on which petitioners rely, is inapposite. Even assuming that a foreclosure sale involves a deprivation of property akin to a seizure pursuant to a writ of replevin, petitioners were not in personal possession of the property that was sold. "The right to a prior hearing, of course, attaches only to the deprivation of an interest encompassed within the Fourteenth [here the Fifth] Amendment's protection" (*id.* at 84). There is no indication that petitioners' status as guarantors of the loan to the corporation gave them any proprietary or possessory interest in the corporation's mortgaged property.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1975.

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[1]Moreover, Texas law gives a debtor the right to recover any actual loss suffered by him as a consequence of a creditor's failure to give proper notice of a foreclosure sale. See Tex. Code Ann. 9.507(a). "[T]hat statutory procedure effects a constitutional accommodation of the conflicting interests of the parties" (*Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 607).